

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 7, 2009 Session

**KP BUILDING PRODUCTS, INC. v. J. W. GARLAND WHOLESALE, INC.,  
ET AL.**

**Appeal from the Chancery Court for Lawrence County  
No. 13159-06     Jim T. Hamilton, Chancellor**

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**No. M2008-00956-COA-R3-CV - Filed August 27, 2009**

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Manufacturer of vinyl siding brought suit against wholesaler when wholesaler refused to pay for specially manufactured inventory that a particular customer no longer wished to purchase; wholesaler claimed it was entitled to return the inventory for a credit to offset the invoiced amount of the shipment. At trial, the manufacturer attempted to introduce an application for credit signed by the wholesaler which the manufacturer contended established a written contract setting forth the business arrangement between the parties, but the trial court ruled it inadmissible. The trial court ultimately found that no written contract existed between the parties, ordered the return of the entire shipment to the manufacturer and awarded the wholesaler a credit for the amount of the inventory. On appeal, the manufacturer challenges the trial court's grant of wholesaler's motion to amend its answer on the day of trial; evidentiary decisions; order for the return of inventory and award of credit to wholesaler; and adoption of wholesaler's statement of the evidence. Finding that the trial court erred in granting wholesaler's motion to amend its answer on the day of trial we reverse the judgment of the trial court and remand for a new trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and  
Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and ANDY D. BENNETT, J. joined.

John R. Jacobson and Elizabeth O. Gonser, Nashville, Tennessee, for the appellant, K. P. Building Products, Inc.

Paul A. Bates, Lawrenceburg, Tennessee, for the appellee, J.W. Garland Wholesale, Inc., Johnny Garland a/k/a Johnny W. Garland and Danette Garland.

## OPINION

### I. Procedural and Factual History

LP Building Products (“LP”) was a manufacturer of vinyl siding, among other products. Since the early 1990s, J. W. Garland Wholesale, Inc., a wholesaler of merchandise owned by Johnny and Danette Garland (collectively referred to herein as “Garland”), had a business arrangement with LP whereby LP would manufacture vinyl siding for a specific customer, Garland would purchase the product from LP and resell it to the customer. KP Building Products, Inc. (“KP”), also a manufacturer of vinyl siding, acquired LP’s vinyl siding division in December 2005. The business arrangement between LP and Garland continued after KP’s acquisition of LP. On December 15, 2005, Garland signed and submitted a document to establish an account with KP, which KP denominated an “Application for Credit” (“Application”).

One of the customer accounts serviced by Garland was Champion Windows and Doors (“Champion”), for whom KP specially manufactured a line of vinyl siding called “Maxim.” On three occasions between December 2005 and April 2006, Garland purchased merchandise, including Champion merchandise, from KP and paid for each purchase in full. Between May 3 and July 28, 2006, KP shipped additional inventory to Garland in the amount of \$143,406.82; this inventory included, but not exclusively, the Maxim product. Garland failed to pay KP for the shipments and asserted that Champion had become dissatisfied with the Maxim product and no longer wished to purchase it.

KP first demanded payment on the inventory shipped between May 3 and July 28 from J. W. Garland Wholesale, Inc.; when it failed to respond, KP then sought payment from Mr. and Mrs. Garland, as guarantors, who also did not respond to the demand. On October 23, 2006, KP filed suit in the Chancery Court for Lawrence County, alleging that it was owed \$143,406.82,<sup>1</sup> plus interest and reasonable attorney’s fees, for the unpaid inventory.

On December 20, 2006, Garland filed an answer, raising the affirmative defense of waiver and/or equitable estoppel. The answer asserted that “[w]hen [KP] purchased [LP]..., [Garland] w[as] assured that all pricing, customer rebates, business rebates, agreements and arrangements would still be in effect”; Garland alleged that it had an oral business arrangement with LP that “if LP lost [a] national account or [Garland] could no longer service said national account, LP agreed to pick up all materials that [Garland] w[as] stocking for said national account.” On November 19, 2007, Garland filed a Motion to Amend its answer; the motion was granted on the morning of trial.

A trial was held on February 5, 2008, and an order entered on February 19 found that: (1) no written agreement existed between the parties; (2) the course of performance and dealings allowed for Garland to return to KP all inventory of LP and KP held by Garland, for which Garland was

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<sup>1</sup> After filing suit and before trial, KP acknowledged that Garland was entitled to a credit of \$3,333.55; as a result, the outstanding balance sought by the KP was \$140,073.27, plus interest and reasonable attorney’s fees.

entitled to receive a credit; (3) the amount sued for was less than the value of the inventory to be returned and, after applying Garland's credit, neither party was owed any money; (4) KP's complaint was otherwise dismissed since there was no evidence of corporate authority to file the action; (5) KP's failure to provide requested documents relating to KP's acquisition of LP created an inference that the content of the documents was adverse to KP's position; (6) KP failed to provide reliable proof of the amounts owed by Garland since no proper foundation was laid for the introduction of the documents KP relied upon; and (7) the document purporting to bind Mr. and Mrs. Garland with a personal guaranty was unreadable and no other proof was presented of the guaranty.

On March 20, 2008, KP filed a Motion to Alter or Amend the Judgment, contending that the trial court erred in limiting Garland's liability solely to the return of KP's and LP's inventory, instead of rendering a monetary judgment, and in requiring KP to accept the return of all inventory held by Garland, and not just the Maxim line of vinyl siding Garland held for Champion. The court denied the motion and KP appealed.

The trial court proceedings were not recorded or transcribed. The parties each filed a proposed statement of the evidence; on October 7, the trial court heard argument and entered an order adopting Garland's proposed statement.

## **II. Statement of the Issues**

KP raises the following issues on appeal:

1. Whether KP is entitled to judgment or, at the least, a new trial because of the trial court's multiple errors.
2. Whether the trial court erred in awarding KP certain inventory in lieu of money damages Garland admittedly owed.
3. Whether the trial court abused its discretion in granting, on the day of trial, Garland's Motion to Amend its answer, allowing Garland to alter its position on material issues in direct contradiction to Garland's deposition testimony and discovery.
4. Whether the trial court abused its discretion in denying admission of certain exhibits that KP offered at trial, when Garland admitted that the contract was binding and that the amounts owed were valid.
5. Whether the trial court erred in holding that KP failed to present evidence of corporate authority.

6. Whether the trial court erred in holding that Garland sustained losses and that those losses should offset money Garland owed KP, based on a document that neither party introduced as an exhibit at trial.
7. Whether the trial court erred in drawing an adverse inference with respect to the Asset Purchase Agreement between KP and LP because the document was not relevant, Garland never moved to compel its production and the trial court never ordered KP to produce it.
8. Whether extraordinary circumstances warrant reversal of the trial court's adoption of Garland's Statement of the Evidence.

### III. Analysis

KP asserts that the trial court erred in granting Garland's Motion to Amend on the day of trial because KP was unduly prejudiced by the amendment of Garland's answer at that time and because Garland filed the motion in bad faith.

"There are several considerations a trial judge should evaluate in determining whether to grant or deny a motion to amend." *Hall v. Shelby County Retirement Bd.*, 922 S.W.2d 543, 546 (Tenn. 1995). These considerations include "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Id.* A trial court's disposition of "a motion to amend the pleadings lies within the sound discretion of the trial court." *Id.* Under the abuse of discretion standard, a trial court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)).

In its complaint, instituted as a suit on a sworn account in accordance with Tenn. Code Ann. § 24-5-107<sup>2</sup>, KP alleged that Garland submitted the Application to obtain a line of credit; that the Application contained provisions pertaining to interest on account balances, costs of collection, etc.;<sup>3</sup> that "shortly thereafter [KP] commenced selling merchandise to [Garland]"; that there was an outstanding balance due and owing of \$143,406.82; and that KP had made a demand for payment

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<sup>2</sup> Attached as exhibits to the sworn complaint were the document referred to by KP as the "Application for Credit", a statement of Garland's account, an affidavit of KP's corporate credit manager attesting to the amount of the account against J. W. Garland Wholesale, Inc., and a separate affidavit against Johnny Garland and Danette Garland, as guarantors.

<sup>3</sup> Paragraph IV of the complaint alleged that, on December 15, 2005, Garland signed and submitted an application for credit, which included the following provisions: (1) interest on overdue account balances was 1.5% per month, 18% per annum; (2) KP was entitled to recover reasonable attorney's fees if required to take legal action to collect any delinquent accounts; and (3) Mr. and Mrs. Garland personally guaranteed the account balance.

pursuant to the guaranties contained on the Application. KP maintained throughout the proceedings that the Application constituted a contract between the parties.

In its original answer, which was unsworn, Garland admitted “the allegations contained in...[KP’s] complaint as they pertain to the ‘Application for Credit’” and “the allegations contained in...[KP’s] complaint as they pertain to orders for merchandise placed by [Garland],” which KP alleged was in the amount of \$143,406.82. The answer, however, denied that the Application “encompasse[d] the full business relationship” or “supercede[d] any oral agreements by and between the parties” and contended that, contrary to an oral agreement, “[KP] ha[d] refused to allow return of the merchandise for credit as requested by [Garland] to offset the total amount allegedly owed.” The answer also asserted affirmative defenses, including “waiver (implied or express) and/or equitable estoppel” factually based in substantial part on Garland’s dealings with LP, and “negligent/fraudulent misrepresentation and/or fraudulent inducement.”

Throughout discovery and depositions, KP maintained that the Application was binding upon the parties and that Garland owed \$143,406.82 in unpaid inventory. Garland continued to admit the existence and provisions of the Application and the orders for the merchandise in the amount of \$143,406.82.<sup>4</sup> In his deposition and interrogatories, Mr. Garland maintained that the parties had a verbal arrangement, not superceded by the Application, whereby Garland was able to return inventory in certain situations for a credit to offset the amount owed.

Eleven months after the answer was filed, and two and a half months prior to trial, Garland filed a Motion to Amend its answer, seeking to strike its admission of the allegations pertaining to

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<sup>4</sup> At his deposition, Mr. Garland testified as to his acknowledgment of the Application and the invoiced amount of the unpaid inventory in the following testimony:

Q. ...That is, the allegations about the application for credit [contained in the complaint] - - are they admitted?

A. I did sign an application for credit. Danette is not - - she did not.

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Q. ...Are you admitting that \$143,406.82 was ordered by your office on and after May 3rd, 2006?

A. It seems to be, yes.

Q. ...Do you have any question as to the validity of that stated amount?

A. No, sir.

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Q. Mr. Garland, is that the credit application about which we’ve been speaking?

A. This does look to be the credit application...

Q. That is your signature?

A. That is my signature. Yes, I did sign it.

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Q. As best you remember, when did KP succeed LP in their vinyl siding operations?

A. It would have been sometime I guess shortly prior to us signing a credit application with them.

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Q. Was [the meeting with KP’s president] before you signed the credit - -

A. It was shortly after. Let’s see. I think that’s in March. The builder’s show is like in March. So it would probably have been March after [sic]. Yes, after I had signed the credit application.

the Application contained in the complaint. The proposed amendment denied that the Application was an “Application for Credit”; added a denial that the Application imposed a personal guaranty on Mr. and Mrs. Garland; and added the language “and the course of dealings and performance in the industry” to the language in the original answer denying that the Application “supercedes any oral agreement between the parties or the manner in which business has been regularly conducted between the parties.” The trial court granted the motion on the day of trial.

KP asserts that it was unduly prejudiced by the trial court’s grant of Garland’s Motion to Amend because “[f]or 11 months, through discovery and deposition, the parties litigated this case based on” the allegations in paragraph IV and Garland’s “admissions of fact.” KP also contends that Garland filed the motion in bad faith because it “changed [Garland’s] position on material allegations regarding the contract between the parties” shortly before trial and the amended answer “directly contradict[ed] Johnny W. Garland’s deposition testimony.”

The record does not show the considerations taken into account by the trial court in granting Garland’s motion to amend.<sup>5</sup> Our review of the record demonstrates that the amendment substantially changed the issues for consideration for the court, for instance, changing one focus of the case to the course of dealing between Garland, KP and, presumably LP, since Garland contended that its original agreement with LP was continued with KP. *See* Tenn. Code Ann. § 47-1-303(d).<sup>6</sup> In addition, Garland’s prior admission of the Application would have allowed the court to find that there was, in fact, a written contract between the parties, thereby limiting, if not eliminating, the court’s consideration of proof of a verbal agreement. We note also that some of the evidentiary issues which were resolved against KP at trial, the propriety of which are presented for resolution in this appeal, *e.g.*, challenges to the authenticity of the Application and its qualification as a business record, would not have arisen had the validity of the Application not been at issue.

The validity and effect of the Application were material to the resolution of this matter and the effect of the trial court’s allowance of the amendment was to allow Garland to assert, for the first time, that the Application did not establish an account with KP and that the course of performance and dealings between the parties, which it claimed included the oral agreement allowing Garland to return the merchandise, controlled Garland’s responsibility for payment of the debt, the amount of which it did not deny. Throughout the prosecution of the action and in preparation for trial, KP was entitled to rely on Garland’s admission of the validity of the Application and the deposition testimony of Mr. Garland, both of which were contradicted by the allegations of the amended answer. Contrary to the Garland’s assertion that KP was not unduly prejudiced because KP had notice of the motion two and a half months prior to trial and because the record contains no written

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<sup>5</sup> The statement of the evidence approved by the trial court does not reflect the presentation of the motion. The statement of the evidence tendered by KP, which was not approved, states that the motion was objected to as being directly contradictory to the original answer, Garland’s discovery responses and Mr. Garland’s deposition testimony.

<sup>6</sup> “A course of performance or course of dealing between the parties...is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.” Tenn. Code Ann. § 47-1-303(d).

objection to the motion, it was Garland's responsibility, not KP's, to have the motion heard, thereby amending its pleadings, if it desired to proceed to trial on the basis of the amended answer. KP had no obligation to press for a hearing on Garland's motion and no responsibility to prepare for trial on the allegations of the proposed amended answer.

Having allowed the amended answer, the proper course would have been for the court to continue the trial of the case to allow KP an opportunity to assess the presentation of its case in light of the facts that the amount of the debt and the validity of the Application were now at issue and to secure necessary witnesses and other proof, the necessity of which may not have been apparent prior to the court's ruling.<sup>7</sup> In accordance with Tenn. Code Ann. § 24-5-107, in the absence of a sworn denial by Garland, KP was entitled to rely upon the validity of the account and the amount sworn to in the original complaint in the preparation and presentation of its case. Upon the allowance of the amendment and Garland's resulting denial of the account, KP was entitled to a continuance "in the interest of justice."

The record thus supports KP's contention that it was unduly prejudiced by the grant of the amendment on the day of trial. As noted previously, some of the evidentiary issues resolved against KP at trial would not have arisen had the trial court allowed KP the benefit of Tenn. Code Ann. § 24-5-107 by holding that the validity and amount of the debt were established on the basis of the sworn complaint. In addition, questions regarding the course of performance and dealings between the parties and whether Garland was entitled to an offset,<sup>8</sup> and, if so, the amount of same, may have been irrelevant.

On the basis of the foregoing we have determined that KP is entitled to a new trial. Our finding in this regard pretermits our consideration of the remainder of the issues presented in this appeal.

## **V. Conclusion**

For the reasons set forth above, the decision of the Chancery Court is REVERSED and REMANDED for a new trial. Costs are assessed against J. W. Garland Wholesale, Inc., and Johnny Garland and Danette Garland, jointly and severally, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE

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<sup>7</sup> Tenn. Code Ann. § 24-5-107 provides that "[a]n account on which action is brought...is conclusive against the party sought to be charged, unless that party on oath denies the account," that "[t]he court shall allow the defendant orally to deny the account under oath," and that "[u]pon such denial,...in the interest of justice, the judge shall continue the action to a date certain for trial."

<sup>8</sup> Garland did not file a counterclaim seeking relief but, rather, sought dismissal of the complaint.

